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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MELVIN L. JOHNSON,

CASE NO. C24-0934JLR

11 Plaintiff,

ORDER

12 v.

13 DEPARTMENT OF VETERANS
14 AFFAIRS,

Defendant.

15 **I. INTRODUCTION**

16 Before the court are (1) *pro se* Plaintiff Melvin L. Johnson's complaint against
17 Defendant United States Department of Veterans Affairs (the "VA") (Compl. (Dkt. # 5));
18 (2) Magistrate Judge Brian A. Tsuchida's order granting Mr. Johnson's application to
19 proceed *in forma pauperis* ("IFP") and recommending that the court review the complaint
20 pursuant to 28 U.S.C. § 1915(e)(2)(B) (IFP Order (Dkt. # 4)); and (3) Mr. Johnson's
21 motion to appoint counsel (Appoint Mot. (Dkt. # 6)). The court has considered Mr.
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1 Johnson's submissions, Magistrate Judge Tsuchida's order, the relevant portions of the
 2 record, and the applicable law. Being fully advised, the court DISMISSES Mr. Johnson's
 3 complaint without prejudice and DENIES Mr. Johnson's motion to appoint counsel.

4 II. BACKGROUND

5 This case arises out of Mr. Johnson's work as a Housekeeping Aid at the VA's
 6 Puget Sound Health Care System in Seattle, Washington. (EEOC Dec. (Dkt. # 5-1) at
 7 1.)¹ On July 31, 2020, Mr. Johnson filed an equal employment opportunity ("EEO")
 8 complaint alleging that the VA discriminated against him and subjected him to a hostile
 9 work environment based on reprisal for prior protected EEO activity when:

- 10 1. from January 14, 2020, until January 31, 2020, [Mr. Johnson] was
 verbally abused and harassed by a coworker (Coworker1);
- 11 2. on January 31, 2020, [Mr. Johnson] was physically assaulted by
 Coworker1, which caused him bodily harm;
- 12 3. on April 29, 2020, [Mr. Johnson] was issued a Notice of Proposed
 Removal from federal service;
- 13 4. on May 20, 2020, the [VA] failed to approve [Mr. Johnson's] request
 for workers' compensation, or words to that effect; and
- 14 5. on November 17, 2020, [Mr. Johnson] was issued a Decision on
 Removal, removing him from federal employment with an effective
 date of November 21, 2020, prior to which he resigned (constructive
 discharge).

16 (*Id.* at 1-2.) On October 30, 2020, the VA dismissed claim 4 for failure to state a claim
 17 but accepted the remaining claims for investigation. (*Id.* at 2.) The VA "provided [Mr.
 18 Johnson] with a copy of [its] report and investigation and notice of his right to request a
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21 ¹ Because Mr. Johnson's complaint contains very little background information (*see generally* Compl.), the court relies on the EEOC decision attached to his complaint to provide
 22 necessary context (*see generally* EEOC Dec.). When reviewing Mr. Johnson's complaint, the
 court looks only at the allegations contained therein.

1 hearing before an EEOC Administrative Judge,” but Mr. Johnson did not request a
2 hearing within the allowable time frame. (*Id.*) In its final decision, the VA “concluded
3 that [Mr. Johnson] failed to prove that the [VA] subjected him to discrimination or
4 retaliation as alleged.” (*Id.*) Mr. Johnson appealed to the EEOC.

5 The EEOC affirmed. (*See id.*) As to claims 1 through 3, the EEOC “found no
6 evidence to causally connect said claims to [Mr. Johnson’s] prior EEO activity.” (*Id.*)
7 The EEOC “found the record revealed there was a tense work relationship between
8 Coworker 1 and [Mr. Johnson], which led to a January 2020 physical altercation between
9 the two, that ultimately led to both being hospitalized.” (*Id.*) The EEOC agreed with the
10 VA’s finding that Mr. Johnson, “while not the initial aggressor, moved beyond
11 self-defense when he admittedly kicked Coworker1 in the face.” (*Id.*) As to claim 5, the
12 EEOC found that Mr. Johnson “failed to show by a preponderance of the evidence that
13 discriminatory motives prompted the proposed and final removal decision.” (*Id.*) Mr.
14 Johnson requested reconsideration.

15 On April 4, 2024, the EEOC denied Mr. Johnson’s request for reconsideration.
16 (*See generally id.*) The EEOC noted that its decision was “final, and there is no further
17 right of administrative appeal from the Commission’s decision.” (*Id.* at 3.) The EEOC
18 informed Mr. Johnson that he had “the right to file a civil action in an appropriate United
19 States District Court within ninety (90) calendar days from the date that [he] receive[d]
20 this decision.” (*Id.*) Furthermore, the EEOC instructed Mr. Johnson that if filed a civil
21 action, he “must name as the defendant in the complaint the person who is the official
22 Agency head or department head, identifying that person by their full name and official

1 title.” (*Id.*) The EEOC warned that “[f]ailure to do so may result in the dismissal of your
2 case in court.” (*Id.*)

3 On June 26, 2024, Mr. Johnson filed a motion for leave to proceed *in forma*
4 *pauperis* (“IFP”), attaching his proposed complaint and motion for appointment of
5 counsel. (*See generally* IFP Mot. (Dkt. # 1).) Mr. Johnson’s complaint alleges that he
6 “was attacked by a V.A. employee,” “suffered a broken bone,” “lost [his] job,” is
7 “stressed out,” “fell sick with congestive heart failure,” and “left in a hostile work
8 environment.” (Compl. at 5.) He seeks compensation for his lost job and personal
9 injuries. (*See id.* at 3, 5.) Although Mr. Johnson alleges federal question jurisdiction, he
10 does not identify the federal laws the VA purportedly violated. (*See id.* at 3.)

11 On June 27, 2024, Magistrate Judge Tsuchida granted Mr. Johnson’s motion to
12 proceed IFP and “recommend[ed] that the complaint be reviewed under 28 U.S.C.
13 § 915(e)(2)(B).” (IFP Order.)

III. ANALYSIS

Below, the court reviews Mr. Johnson's complaint pursuant to 28 U.S.C. § 1915(e)(2) before considering his motion to appoint counsel.²

A. § 1915(e)(2)(B) Review

18 The court dismisses Mr. Johnson's complaint for failure to (1) name the proper
19 defendant and (2) plausibly allege facts supporting a claim for relief. Below, the court

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21 ² The court preliminarily determines, based on the EEOC decision, that Mr. Johnson
22 exhausted his remedies. (*See* EEOC Dec. at 3.) The court further determines that Mr. Johnson
timely filed this action within the relevant 90-day window.

1 provides the relevant legal standard under § 1915(e)(2) before turning to Mr. Johnson's
2 complaint.

3 Under 28 U.S.C. § 1915(e)(2), district courts have authority to review IFP
4 complaints and must dismiss them if "at any time" the court determines that a complaint
5 fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2); *Lopez v.*
6 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (clarifying that § 1915(e) applies to all IFP
7 proceedings, not just those filed by prisoners). Because Mr. Johnson is a *pro se* plaintiff,
8 the court must construe his pleadings liberally. See *McGuckin v. Smith*, 974 F.2d 1050,
9 1055 (9th Cir. 1992). Nonetheless, his complaint must still contain factual allegations
10 sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 555 (2007). Although the pleading standard announced by
12 Federal Rule of Civil Procedure 8 does not require "detailed factual allegations," it
13 demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation."
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555) (requiring
15 the plaintiff to "plead[] factual content that allows the court to draw the reasonable
16 inference that the defendant is liable for the misconduct alleged"); see Fed. R. Civ. P.
17 8(a)(1)-(2) (requiring a pleading to contain "a short and plain statement of the claim
18 showing that the pleader is entitled to relief").

19 First, Mr. Johnson fails to state a claim because federal law requires him to name
20 the head of the VA as the defendant rather than the agency itself. See 42 U.S.C.
21 § 2000e-16(c) ("[A]n employee . . . if aggrieved by the final disposition of his [EEOC]
22 complaint, . . . may file a civil action . . . [and] the head of the department, agency, or

1 unit, as appropriate, shall be the defendant.”); *Whitbeck v. James*, No. C15-1949RSM,
2 2017 WL 3017540, at *3 (W.D. Wash. July 17, 2017) (“[T]he head of the agency where
3 Ms. Whitbeck worked is the only proper defendant in this case.”); *Daniel v. Nicholson*,
4 No. 07-2554-B/V, 2008 WL 444677, at *1 n.1 (W.D. Tenn. Feb. 15, 2008) (“In this case,
5 the proper defendant is the Secretary of the Department of Veterans Affairs.”). The court
6 therefore DISMISSES Mr. Johnson’s complaint on this ground.

7 Second, Mr. Johnson fails to state a claim because the factual allegations in his
8 complaint fail to meet minimum pleading requirements. The court construes Mr.
9 Johnson's complaint as pleading claims for hostile work environment and wrongful
10 termination under Title VII of the Civil Rights Act of 1964.³ Title VII provides in
11 relevant part that “[i]t shall be an unlawful employment practice for an employment
12 agency to . . . discriminate against[] any individual because of his race, color, religion,
13 sex, or national origin.” 42 U.S.C. § 2000e-2(b). Below, the court provides the relevant
14 legal standards and considers the sufficiency of Mr. Johnson’s allegations.

To establish a prima facie case for hostile work environment, Mr. Johnson must plead facts which, if taken as true, plausibly suggest each of the following: (1) he was “subjected to verbal or physical conduct” because of his race, color, religion, sex, or national origin; (2) “the conduct was unwelcome”; and (3) “the conduct was sufficiently severe or pervasive as to alter the conditions of [his] employment and create an abusive

³ In construing Mr. Johnson’s complaint as pleading claims for hostile work environment and wrongful termination under Title VII, the court does not mean to limit Mr. Johnson’s ability to plead other claims in his amended complaint.

1 work environment.” *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002). To the
2 extent Mr. Johnson’s claim is premised on a former co-worker’s alleged hostilities, he
3 must also show that the VA “knew or should have known about” the harassment and
4 “fail[ed] to take immediate corrective action.” *Fried v. Wynn Las Vegas, LLC*, 18 F.4th
5 643, 647 (9th Cir. 2021).

6 To state a claim for wrongful termination, Mr. Johnson must plead facts which, if
7 taken as true, plausibly suggest each of the following: (1) he was a member of a
8 protected class; (2) he was qualified for his position and performing his job satisfactorily;
9 (3) that he experienced an adverse employment action (i.e., was discharged); and (4) that
10 similarly situated individuals outside of the protected class were treated more favorably
11 than Mr. Johnson or that other circumstances surrounding his termination give rise to an
12 inference of discrimination. *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th
13 Cir. 2020); *see also Tipaksorn Tungjonyatham v. Johanns*, 500 F. App’x 686, 689 (9th
14 Cir. 2012).

15 Mr. Johnson falls well short of stating a claim for hostile work environment or
16 wrongful termination under Title VII. The complaint is silent as to whether Mr. Johnson
17 belongs to a protected class, and Mr. Johnson pleads no factual allegations related to his
18 race, color, religion, sex, or national origin. (*See generally* Compl.) He also fails to
19 plead any facts suggesting that (1) the VA knew or should have known about the alleged
20 hostile work environment his former co-worker created; (2) he was performing his job in
21 a satisfactory manner; or (3) that similarly situated individuals outside of Mr. Johnson’s
22 protected class were treated more favorably or that other circumstances surrounding his

1 termination give rise to an inference of discrimination. (*See generally id.*) The court
2 therefore DISMISSES Mr. Johnson's complaint on these grounds.

3 When a court dismisses a *pro se* plaintiff's complaint, it must give the plaintiff
4 leave to amend “[u]nless it is absolutely clear that no amendment can cure the defect” in
5 the complaint. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). In light of the
6 Ninth Circuit's liberal policy favoring amendment, the court GRANTS Mr. Johnson
7 leave to file an amended complaint. If he does so, he must name Denis R. McDonough,
8 Secretary of Veterans Affairs, as the sole defendant. He must also include short, plain
9 statements setting forth: (1) the legal basis for his claim(s); (2) exactly what the VA did
10 or failed to do and when that conduct occurred; (3) how the VA's actions or inactions are
11 connected to his legal claims (i.e., how he was discriminated against); and (4) the specific
12 injury or injuries he suffered as a result of the VA's conduct and when he suffered it. Mr.
13 Johnson shall file his amended complaint, if any, by no later than **August 21, 2024**. The
14 court warns Mr. Johnson that his failure to timely comply with this order or to file an
15 amended complaint that remedies the deficiencies discussed in this order will result in the
16 dismissal of his case with prejudice and without leave to amend.

17 **B. Motion to Appoint Counsel**

18 The court next considers Mr. Johnson's motion to appoint counsel. The court has
19 reviewed Mr. Johnson's motion and exercises its discretion to DENY it.

20 Generally, a civil litigant has no right to counsel. *See Campbell v. Burt*, 141 F.3d
21 927, 931 (9th Cir. 1998). The court “may,” however, “request an attorney to represent
22 any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). The Ninth Circuit has

1 instructed district courts to appoint counsel for indigent civil litigants if “[e]xceptional
 2 circumstances exist.” *See Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 925
 3 (9th Cir. 2017). “When determining whether ‘exceptional circumstances’ exist, a court
 4 must consider ‘the likelihood of success on the merits as well as the ability of the
 5 [litigant] to articulate his claims *pro se* in light of the complexity of the legal issues
 6 involved.”” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (quoting *Weygandt v.*
 7 *Look*, 718 F.2d 952, 954 (9th Cir. 1983)). “Neither of these considerations is dispositive
 8 and instead must be viewed together.” *Id.*

9 The first consideration, Mr. Johnson’s likelihood of success on the merits, does
 10 not favor a finding of “exceptional circumstances.” The EEOC determined that Mr.
 11 Johnson failed establish any unlawful discrimination or retaliation (*see* EEOC Dec. at 2),
 12 and he has come no closer to doing so with his present complaint (*see generally* Compl.).
 13 Although Mr. Johnson may be able to remedy his complaint, the court finds that his
 14 likelihood of success on the merits, at least at this time, is low.

15 The second consideration, Mr. Johnson’s ability to articulate his claims in light of
 16 the complexity of the legal issues involved, is neutral. On the one hand, Mr. Johnson has
 17 difficulty articulating his claims. (*See generally id.*) On the other hand, the issues in this
 18 case are not very complex; the court has outlined the elements Mr. Johnson must satisfy
 19 to make out prima facie claims for hostile work environment and wrongful termination,
 20 and all he must do to state a claim is provide simple, factual sentences establishing each
 21 of those elements.

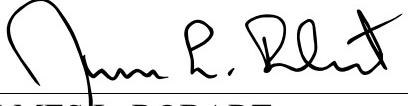
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1 Taking these considerations together, the court finds that this is not an exceptional
2 case warranting appointment of counsel. The court therefore DENIES Mr. Johnson's
3 motion to appoint counsel without prejudice to filing a renewed motion after he files his
4 amended complaint.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the court DISMISSES Mr. Johnson's complaint (Dkt.
7 # 5) without prejudice and with leave to amend. Mr. Johnson shall file his amended
8 complaint, if any, by no later than **August 21, 2024**. If Mr. Johnson does not timely file
9 an amended complaint that addresses the deficiencies identified in this order, the court
10 will dismiss this action with prejudice. The court DENIES Mr. Johnson's motion to
11 appoint counsel (Dkt. # 6).

12 Dated this 31st day of July, 2024.

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JAMES L. ROBART
United States District Judge